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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 443

UNITED STEELWORKERS OF AMERICA,
Petitioner,

versus

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

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On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED[1]

1. Does the extent of the District Court's authority under Section 301(a) to enforce agreements permit it to fully interpret such agreements to determine whether there has been a breach of a promise to arbitrate?

2. Did the District Court properly exercise its authority and discretion in deciding that contracting out

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[1] The opinions below are found in the Transcript of Record, herein referred to by designation "R," at p. 101, District Court, and at p. 109, Circuit Court of Appeals.

work was not subject to arbitration under this agreement?

STATUTES INVOLVED

The statute directly involved, Section 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. Section 185(a), is set out in petitioner's brief at p. 5. Also pertinent are portions of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. Section 151, 160(l); the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 542, Section 704(e), 29 U.S.C. Section 158(e); the Railway Labor Act, 44 Stat. 577, 45 U.S.C. Section 153(i) and (p), 157 and 159; and the U. S. Arbitration Act, 61 Stat. 669, 9 U.S.C. Sections 3-4, which appear in the appendix to this brief.

STATEMENT

Respondent, Warrior & Gulf Navigation Company, hereinafter sometimes called the Company, and petitioner, United Steelworkers of America, hereinafter sometimes called the Union, entered into a 3-year labor contract in 1956 (R. 5-21), providing for limited arbitration of disputes thereunder. Section 10; R. 15-17.[2] The Union filed a grievance questioning the Company's right to contract out maintenance work.[3] The District Court

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[2] Section 10 reads, in pertinent part:

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

* * * * *

"Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decisions. * * * *"

[3] The term "subcontracting" is sometimes erroneously used in the record and briefs herein; the Company does not sub-let, it is the *owner* which contracts out certain repair work which it desires done on its own equipment.

rejected an application by the Union to compel the Company to arbitrate this question, after a showing that (1) the contract contained no prohibition against contracting out work, R. 5 *et seq.*; R. 99; (2) the Union had unsuccessfully attempted to negotiate such a restriction into this labor agreement and into the parties' preceding labor contracts, R. 74-75; 98-99; (3) the contract, Section 10, R. 15, vested strictly management functions exclusively in the Company, including, Section 11, R. 17-18, the direction of the working force and its reduction for lack of work or other legitimate reasons, and (4) the Company had for many years, without objection by the Union, R. 66, 76-77, openly construed the agreement to permit such contracting out of work with resultant fluctuations in its work force. On these findings, the District Court, R. 101 *et seq.*, and the Circuit Court of Appeals, R. 109 *et seq.*, concluded no agreement had been made to arbitrate such a grievance.

Petitioner states, Br. p. 11, that between March, 1956, and December, 1958, "the Company almost halved the bargaining unit from 42 to 23 men by greatly increasing the amount of maintenance work (which these employees could perform and had performed in the past) contracted to other companies," and that contracting companies "used" Warrior & Gulf supervisors to lay out the Warrior & Gulf work. These statements are misleading; moreover, why the odd period between March, 1956, and December, 1958, was selected is not explained.

The 3-year contract involved here was signed in November, 1956. R. 73. The first, of several successive such labor agreements between the parties, was executed by them in 1952. R. 73. The evidence shows, R. 60-61, 65-68, 78-79, 86:

Year	Work Contracted Out	Number of Mechanical Employees
1954	$234,000	50
1955	33,940	57
1956	37,484	32
1957	41,162	24
1958	48,000	23[4]

The conclusion of its construction and refitting program in the Company's own yard at the end of 1956 led to the reduction in the work force by 8 men; of the total of 24 men remaining at the beginning of 1957, 5 later retired or quit, and 4 old employees were recalled in 1958. No grievance was filed until August, 1958, R. 76, almost two years after (1) the last contract was signed and (2) the last reduction in the work force.

Shipyard repair costs depend on materials as well as labor, of course, and a $100,000 job can involve very little labor but much engineering skill, expensive material and special equipment which is available only in certain yards. Nor does the record bear out the statement that the maintenance work contracted out was, to any appreciable extent, work which the laid-off employees "could perform and had performed in the past." The record shows that the Company did not deviate from its practice of contracting out this work, and that it contracted out no more than in previous years; that the layoffs were occasioned by a return to normal maintenance after a period of special work. R. 66-67. The most

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[4] The Company has contracted out maintenance repair work from the inception of its operations in 1940, R. 58, 59, 66. It employed as many as 92, in 1951, in its maintenance force, reduced thereafter to 47 in 1952, and increased to 51 in 1953. R. 60. This table is limited to the years beginning in 1954 because the record contains no figures on the dollar volume of work contracted out in prior years. R. 67-68 The total increase in work contracted out in the last 4 years was $14,000, an average of $3,500 per year. It would have cost the Company more than that per year (40 hours times 52 weeks) for *one* more man. R. 8 shows rates for the mechanics and helpers involved here.

sizeable reduction, in the period for which figures are in the record, came between 1955 and 1956, when 25 employees were laid off out of 57, while the work contracted out increased only $3544.00. Further, it is inaccurate to state that the contracting companies "used" Warrior & Gulf supervisors to lay out the Warrior & Gulf work. In contracting out work, the Company followed the common and necessary practice of sending its engineers and, at times, foremen, to specify and authorize at the outside shipyards the work to be done there, and to check periodically on its progress. R. 36-37, 70-71.

The *Union* introduced the line of testimony going to the *merits* of the *grievance*. R. 34, *et seq.*; the Company's opposition to the injunction petition was based on the meaning of the contract's arbitration provision, and its evidence was as to the legal effect that could be given thereto in the light of the parties' demonstrated intent. R. 29, 57-79. The Union below contested consideration by the Court of evidence as to the proper *legal* construction to be placed on this contract i.e., on the issue of arbitrability, contending that such evidence goes to the merits of the case.

SUMMARY OF ARGUMENT

In each of its several collective bargaining agreements with the respondent, the petitioner sought to negotiate the very relief which it in this proceeding seeks to obtain through arbitration. The labor contract may be likened to a statute governing the parties, subject to similar rules of construction and flexibility; the "legislative history" of this contract shows the parties' intent in discussing, but rejecting the inclusion therein of a provision limiting contracting out work. That intent is confirmed not alone by the absence of any pro-

vision thereon in the agreement, but also by the continuous practice of the respondent in contracting out work throughout its entire history of operations, including the years of contractual relations with petitioner, during which no grievance concerning the practice was filed until that in the instant case, which came almost 2 years after the contract was signed and the last layoff of employees affected by the contracting out practice.

The labor contract here does not provide for unqualified arbitration of all disputes, as do some, but limits arbitration to interpretation of the contract's terms and excludes from arbitration management functions like directing the work force and, for legitimate reasons, reducing it. It is the court's duty to construe to determine whether there has been broken a promise to refer the issue to arbitration before it may compel arbitration; the court may not be used under Section 301(a) of the Taft-Hartley Act as a mechanical device for ordering parties to arbitration where it is convinced that they have not agreed to arbitrate. The legislative history of this statute and the other federal labor laws making up our national labor policy frown on governmental compulsion as to the substantive terms in collective bargaining, underscore the active role of the court in determining contract breach under Section 301(a), and clearly contemplate active participation by the court in the arbitration scheme. Finally, public interest will best be served by a policy which encourages certainty, rather than uncontrolled enlargement by arbitrators, of the parties' stipulation to arbitrate.

ARGUMENT

I.

The District Court had the authority to interpret this promise to arbitrate, as it would any other agreement, to determine whether there was a breach thereof.

(a) **Background.**

Before *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), there was no settled right to compel, by federal equity decree of injunction,[5] adherence to the terms of a labor agreement. Section 301(a) of the Labor Management Relations Act, 1947[6] had been interpreted previously to allow only damage suits for breach of contract, in view of the Norris-LaGuardia Act anti-injunction disability imposed on the district courts. *Mead v. Teamsters*, CA-1, 1954, 217 F. 2d 6. Because arbitration is favored in the Norris-LaGuardia Act, however, this Court in the *Lincoln Mills* case found it consistent with the federal labor policy to allow injunctive relief under Section 301(a)—the only available statutory authority for such—for the limited purpose of enforcing agreements to arbitrate and arbitration awards thereunder. All of this, of course, relates to private litigation, for where the Government has sought injunctions in labor cases the Norris-LaGuardia Act has not prevented their issuance, either because legislation subsequent to the Norris-LaGuardia Act expressly permitted it, *Mead v. Teamsters*, 217 F. 2d at p. 9, or because the proper exercise of executive authority warranted it, *United Steel-*

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[5] *Bull S. S. Co. v. Seafarers' Union*, CA-2, 1957, 250 F. 2d 326, cert. den. The Union in the instant case seeks, under the equity powers of the District Court, an order of specific performance by injunction. R. 3.

[6] Section 301(a) of the Taft-Hartley or Labor Management Relations Act, 1947, was not affected by the changes made in the Labor-Management Reporting and Disclosure Act of 1959.

workers v. U. S., No. 504, U.S. , 4 L. Ed. 2d 12 (1959).

Before proceeding, it is necessary to examine Section 301(a) and its legislative history. There can be no doubt Congress intended thereby, along with other provisions of the Taft-Hartley Act, to swing the balance of power back somewhat from the extreme to which unions had been favored in the Norris-LaGuardia and Wagner Acts;[7] this section, and the companion Section 303 were designed to give federal court access, with decisions by federal judges and juries, to private parties hurt by breach of contract and certain other specified private wrongs.[8] All this has been recognized so far by this Court up to the point of the question directly raised here.[9] What must now be decided is whether, while directing the federal district courts to hear and decide all aspects of contract breach cases where damages are sought, Section 301(a) does not clothe those courts with authority to fully and fairly construe arbitration provisions in those contracts where specific performance is sought.

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[7] 93 Cong. Rec. 7690 (1947).

[8] 93 Cong. Rec. A3232, 4410, 5139, 5290, 6609, 6612 (1947). See, also, House Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), p. 42, stating that "unions that engage in these practices to the injury of another may subject themselves to liability under *ordinary principles of law*"; Senate Minority Rep. No. 105, Part 2, 80th Cong., 1st Sess. (1947), p. 475, declaring that Section 301 "does not * * * create a new cause of action but merely makes the existing remedy available to more persons * * * "; Senate Majority Rep. No. 105, 80th Cong., 1st Sess. (1947), pp. 421-424, referring to the "right of action in the Federal courts"; House Minority Rep. No. 245, 80th Cong., 1st Sess. (1947), p. 109, pointing to the "question of conferring upon Federal courts *broad* power to entertain suits for violation of union agreements." Our emphasis. The debates and reports clearly evince the intent of Congress to have the courts retain their traditional power to interpret contracts and to try these cases as they would any others; all that was added was a longer arm, to reach those until then beyond its reach because of absence of diversity and jurisdictional amount. See detailed legislative history in Appendix to *Textile Workers Union v. Lincoln Mills*, 353 U.S. at p. 485 *et seq.*

[9] *Assn. of Westinghouse Employees v. Westinghouse Elect. Corp.*, 348 U.S. 437 (1955) , and *Lewis v. Benedict Coal Corp.*, ___ U.S. ___, 4 L.Ed. 2d 442 (1960).

The question is not difficult where the parties have provided for unlimited arbitration,[10] or have by express language shown the issue to be arbitrable;[11] it raises problems only where the contract must be interpreted from something other than the clearest kind of language in the agreement itself. In these latter cases, there being a possibility that some arbitrators might conceivably consider the issues arbitrable, are the hands of the court tied except to refer them, in its own injunction order, to arbitration? Or may it see for itself whether these private parties have agreed to arbitrate before issuing its equity order compelling specific performance?

It is also necessary, at the outset, to restate the role of collective bargaining in our national labor policy. Collective bargaining comes before arbitration, of course,[12] and it is *free* bargaining, without compulsion to agree.[13] The arbitration, if any, which is agreed upon in such bargaining, is thus consensual, *voluntary* arbitration. The interpretation of that agreement to arbitrate must be what the parties intended.

As noted in *NLRB v. Insurance Agents Union*, No. 15, ... U.S. ....., 4 L. Ed. 2d 454, 465 (1960), "our labor policy is not presently erected on a foundation of Government control of the results of negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2." Congress intended that the parties should have wide latitude in their negotiations, unrestricted by governmental regulation of the substantive solution of their differences. *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959).

Section 301(a) and its legislative history can be read

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[10] *Union Contract Clauses*, Commerce Clearing House, Inc., Chicago, 1954, p. 599, ¶ 51,552.08.

[11] Cf. *In re Bradley*, 30 Labor Arbitration Reports 1060 (1958).

[12] National Labor Relations Act, Section 1, 29 U.S.C. 151.

[13] *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 402 (1952).

to mean only that labor contracts are to be interpreted by the federal courts in the same manner that they interpret all other contracts; that is, with due regard for all pertinent factors (including the special nature of labor agreements, the arbitration process, and industrial relations). There is no national labor policy on arbitration which is superior to the national labor policy on freedom of contract in collective bargaining, and the express statutory basis of relief found in Section 301(a), and the penumbra thereof,[14] represent the latest expression of our national labor policy by the designation of the federal district courts as the judges of arbitrability. Once the court's power to order arbitration is conceded, public policy is no longer a consideration and there remains only a determination of *private* rights.

In the *Lincoln Mills* decision, the courts are directed to find the federal substantive law from four sources:[15] (1) all national laws, (2) the Labor Management Relations Act, (3) the penumbra of express statutory mandates, and (4) state law if compatible with the purpose of Section 301.[16]

It is evident, too, from the statutory language thereof that the procedural law must be consistent with the purpose of Section 301.

Some light is found in national law other than the Labor Management Relations Act. For example, though

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[14] *Textile Workers v. Lincoln Mills, supra*, 353 U.S. at p. 457.

[15] 353 U.S., at page 456.

[16] Surely *Lincoln Mills* does not direct that the *only* federal substantive law to be *fashioned* under Section 301(a) is that wherever the conventional arbitration and no-strike clauses appear the only function of the courts is to order *final* and binding arbitration on *any* claim, whether arbitrable or not in the view of the court, that some provision, express or implied, has been breached. Cf. pet. Br. pp. 44, 50. The decision obviously contemplates the development of a new phase of federal law "by the (progressive) course of litigation." Cf. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, at pp. 480-481 (1955).

it may not apply to labor agreements,[17] a question on which this Court found it unnecessary to pass in its *Lincoln Mills* decision, the U. S. Arbitration Act, 61 Stat. 669, 9 U.S.C., Sect. 1, nonetheless represents federal public policy in the enforcement of arbitration agreements, and it, Sections 1, 4, empowers the district court, by judge or jury, to fully "hear and determine" whether there has been an agreement to arbitrate before directing that the dispute be arbitrated.[18] The Railway Labor Act, 45 U.S.C., Sections 151-163, 181-188, is another source of guidance in the national law; here we find grievance arbitration through the Railroad Adjustment Board and the National Mediation Board subject to court protection against abuse of the authority granted by the parties for arbitration.[19] Some light is given, too, by jurisprudence under the National Labor Relations Act. There we find no refusal to bargain in management unilateral action, after execution of the agreement, on subjects of demands made and rejected, as here, in the negotiation of the contract, *Matter of Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), enf'd, *NLRB v. Jacobs Manufacturing Co.*,

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[17] *New York University Eighth Annual Conference on Labor*, Matthew Bender & Co., Inc., Albany, N. Y., 1955, pp. 427 *et seq.*

[18] *Engineers Assn. v. Sperry*, CA-2, 1957, 251 F. 2d 133, 136, notes that while the U. S. Arbitration Act is not binding in cases involving Section 301 of the Taft-Hartley Act, it does provide a "guiding analogy." The legislative history shows that the intent was to enforce arbitration agreements "in the same way as other portions of the contract." 65 Cong. Rec. 11080 (1924).

[19] In *Brotherhood of Railway and S. S. Clerks v. Atlantic Coast Line RR*, CA-4, 1958, 253 F. 2d 753, an award by arbitration of the Railroad Adjustment Board was set aside, the Court noting that this statute, part of the national labor policy, provides that suit for enforcement of such awards shall proceed like *all other suits* in federal court. 45 U.S.C. Section 159, Third (b), allows court interpretation of the agreement to arbitrate to determine whether the arbitrator's award was authorized thereby; 45 U.S.C. Section 153, First (p), makes the arbitration findings, on application for enforcement in the district court, only *prima facie* evidence of the facts therein, and directs the court to "proceed in all respects as other civil suits." See, also, Smith and Merrifield, *Labor Relations Law*, The Bobbs-Merrill Co., Indianapolis, 1960, page 876: "In setting up the National Railroad Adjustment Board, Congress proceeded upon the basis of fifty years of experience with various attempts to provide effective methods of settlement of disputes in the railroad industry."

CA-2, 1952, 196 F. 2d 680, 8 Labor Law Journal 676, 688, fn. 70 (Oct. 1957), though the duty to bargain, once a union is certified—which may be equated to the duty to arbitrate once there is a collective bargaining contractual provision on arbitration—continues even after a contract is signed. Thus, no impediment to the encouragement of collective bargaining has been found in the refusal to bargain as to matters already rejected in bargaining; the District Court in the instant case may be said to have found no injury to the arbitration process in foreclosing arbitration to a matter already thrashed out and discarded by the parties themselves.[20] Finally, Congress in the Labor-Management Reporting and Disclosure Act of 1959, Section 704(e), recognizing the frequency of subcontractor clauses as the means of limiting normal management functions, sanctioned the express use of such subcontract clauses in certain situations which otherwise might render them unlawful.[21] State law "compatible with the purpose of Section 301," *Textile Workers v. Lincoln Mills*, 353 U.S. at p. 457, may be found which does not compel arbitration unless the party demanding it *introduces evidence* of the existence of an arbitrable dispute. *Engineers Assn. v. Sperry*, 251 F. 2d at p. 137, referring to the New York law.[22] If the various other

[20] Finding 8, R. 105.

[21] Cf. Rothman, General Counsel of NLRB, "The Law and Secondary Boycotts in Perspective," 45 LRRM 390, 397 (1960): "Collective bargaining agreements frequently contain provisions which prohibit employers from subcontracting work which is normally done within the bargaining unit * * * ."

[22] Cox, *Cases on Labor Law*, Foundation Press, Brooklyn, 4th Ed., 1958, pp. 775-776, notes that "the issue most frequently litigated under such statutes as Article 84 of the New York Civil Practice Act is the power of the arbitrator to make an award upon the issue which one party wishes to submit * * * Since the basic theory of judicial intervention was that the courts were enforcing a contract made by the parties, the issue of arbitrability *vel non* was simply a question of contract interpretation." Minnesota in 1957, and Wyoming in 1959 adopted the Uniform Arbitration Act, which follows the pattern of the New York statute, recommended in 1955, on the basis of long experience, by the Conference of Commissioners on Uniform State Laws. 9 Uniform Laws Annotated, p. 76.

applicable federal laws—the Norris-LaGuardia Act, the National Labor Relations Act, the Taft-Hartley Act and the Labor-Management Reporting and Disclosure Act of 1959—are read with the comprehensive labor arbitration provisions of the Railway Labor Act, the national labor policy on arbitration (pending further Congressional action thereon) would appear to give to the federal district courts the scope of authority contended for here.

(b) The District Court may determine arbitrability before ordering arbitration.

There appears to be no court decision which questions the right and, indeed, the *duty* of the district court to determine arbitrability. On the other hand, the courts, after full consideration of the arguments urged by petitioner here, have held it to be inescapable that a court which is called upon to issue an injunction must necessarily decide something.[23] *UAW v. Benton Harbor Malleable Industries*, CA-6, 1957, 242 F. 2d 536; *Local 149, Amer. Fed. of Tech. Engineers v. Gen. Elect. Co.*, CA-1, 1957, 250 F. 2d 922; *Boston Mutual Life Ins. Co. v. Ins. Agents Union*, CA-1, 1958, 258 F. 2d 516; *Engineers Assn. v. Sperry*, CA-2, 1957, 251 F. 2d 133; *Independent Petroleum Workers of America, Inc. v. Standard Oil Company*, CA-7, 1960, ... F. 2d ....., 45 LRRM 2843. It logically follows from the nature of the suit under Section 301 that "the court must decide whether the plaintiff has made his case." Cox, p. 54, "Reflections Upon

[23] Cf. concurring opinion of Mr. Justice Reed, *Assn. of Westinghouse Employees v. Westinghouse Electric Co.*, 348 U.S. 437, at p. 463: "Since the contract entered into through provisions of the Labor Act creates rights over which Congress had legislative authority, a breach of that contract is likewise within its powers. Congress by Section 301 has manifested its purpose to vest jurisdiction over breaches, to a certain extent, in the federal courts * * *. The course of action for breach of contract is thus a course of action arising under federal law * * * ." Cf., also, dissent, *Ibid* at page 465, in agreement therewith that the Taft-Hartley Act made labor contracts subject to "construction and interpretation" by the federal courts.

Labor Arbitration in the Light of the Lincoln Mills Case," *Arbitration and the Law*, Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators, BNA Incorporated, Washington, D.C. (1959), and, at page 55 of same work, arbitrators cannot be treated as "administrative agencies to which all disputes * * * must be referred in the first instance or even treat them as courts of general jurisdiction * * * as long as arbitration is consensual and the obligation of the court is to enforce a voluntary agreement * * *. In my judgment there is not the slightest basis for criticizing judicial opinions which say that * * * arbitrability is for the court * * * ."

The *Lincoln Mills* case must be interpreted to the same effect, for it is axiomatic that the power to order implies the authority to refuse to order. Certainly it was not the intent of Congress to make the federal courts a mere conduit for automatic and mandatory submission of all questions to arbitration; on the contrary, "It cannot be too often repeated that judges are not automata." *Universal Camera v. NLRB*, 340 U.S. 474, at p. 489. The *Lincoln Mills* decision, having approved arbitration enforcement under Section 301(a), must be read to leave it to Congress to limit the equity jurisdiction of the courts in such matters, if that is to be done.

So, when may the court refuse, and when must it order a reluctant party to proceed to arbitration when the contract does not *by express language* indicate the parties' intent? Thus far, the lower courts have suggested some answers: (1) If there is a broad arbitration clause—either covering every subject which could conceivably come under the contract, or covering every dispute whether or not related to the contract—the district court has no choice but to compel arbitration.

Commerce Clearing House *Union Contract Clauses*, p. 599, ¶ 51,552.08. *Lodge No. 12, Int. Assn. of Machinists v. Cameron Iron Works*, CA-5, 1958, 257 F. 2d 467. (2) If the subject-matter of the grievance appears, by fair construction of the contract, outside the scope of the agreement therein to arbitrate, the parties will not be compelled to submit the merits to arbitration. *UAW v. Benton Harbor Malleable Industries*, CA-6, 1957, 242 F. 2d 536; *Local 149, Amer. Fed. of Tech. Engineers v. Gen. Elect. Co.*, CA-1, 1957, 250 F. 2d 922; *Boston Mutual Life Ins. Co. v. Ins. Agents Union*, CA-1, 1958, 258 F. 2d 516; *Engineers Assn. v. Sperry*, CA-2, 1957, 251 F. 2d 133; *Independent Petroleum Workers of America, Inc. v. Standard Oil Company*, CA-7, 1960, F. 2d , 45 LRRM 2843.

Analogy may be drawn between the specific requirement, made by the parties themselves in their contract, of court determination of arbitrability prior to arbitration of any issue,[24] and the requirement of prior determination of arbitrability necessarily inherent in Section 301(a). Can it be said that one gives, or can give, greater authority to the court than the other?

When Congress enacted Section 301(a) in 1947 it did so as part of a scheme in a modification 15 years later of our national labor policy originally set in motion by the Norris-LaGuardia Act in 1932 if not in the earlier Clayton Act; the Taft-Hartley Act provided remedies in Section 301(a) against breach of contract and in Section 303 against certain unfair labor practices by unions. The history behind these provisions is that unions had not been subject to reach, because unincorporated and for

[24] See *Cameron Iron Works*, CA-5, 1958, 257 F. 2d at p. 470, fn. 7; *Int. Union of Electrical and Machine Workers, AFL-CIO. v. Gen. Elect. Co.*, Conn. Super. Ct., Fairfield County, 1959, 36 Labor Cases (CCH) ¶ 65,273.

other reasons overcome by the new statute, and it was felt necessary to make redressable those unfair labor practices denounced in Section 303 and contract violations (Section 301). Congress could have entrusted these remedies to an expert body like the National Labor Relations Board, or established a special labor court; it chose, instead, to let the federal judiciary construe the contracts for breach thereof and to determine whether the practices denounced in Section 303 were in fact engaged in. Congress having had no hesitancy in entrusting such a vital part of our national labor policy to the judgment of the federal courts, it is beside the point to urge, as do some arbitrators, that only arbitrators are competent to judge whether *arbitration commitments* in labor agreements have been violated—when Congress has said plainly in Section 301(a) that when such a contract is there taken for relief *the federal court* shall interpret it.[25]

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[25] Pet. brief, p. 44. So abundant has been labor litigation in the federal courts since the Taft-Hartley Act was adopted in 1947 that it may be questioned that federal judges are less expert in labor relations theory and practice, including arbitration principles, than many, if not most arbitrators. For every arbitrator who has handled 100 labor arbitration cases, there may be 50 who have heard less than 10. See, also, Aaron, "On First Looking into the Lincoln Mills Decision," *Arbitration and the Law*, Proceedings of the Twelfth Annual Meeting of the National Academy of Arbitrators, BNA, Inc., Washington, D. C. (1959), pp. 8-9: "To me, Judge Magruder's position (in upholding the court's authority to determine arbitrability by contract interpretation, *Local 149, Amer. Fed. of Tech. Engineers v. General Elect. Co.*, CA-1, 1957, 250 F. 2d 922) is unassailable; moreover, I do not think it is weakened by the fact that not all of his brethren have his appreciation of the nice distinction between determining whether an arbitrable issue exists and determining the merits of an arbitrable issue. By now the parties should have a pretty good idea of the risks involved in submitting the question of arbitrability to a court for decision, and if they are dissatisfied with the results they must hold themselves principally to blame." Nor does it follow that arbitrators, even the most experienced, do not think like judges in this field. The veteran arbitrator Peter Kelliher very recently decided the issue, on practically identical facts, just as did the courts below in the *Warrior & Gulf* case here. *Matter of Minneapolis-Moline Co.*, 33 Labor Arbitration Reports 893 (1960). Cox, pp. 45-46, *Arbitration and the Law*, would, as an arbitrator, stress the same points for contract construction which persuaded the District Court and the Circuit Court here: The "*context in which (the agreement)* was *negotiated*," and " * * * legal doctrines, a sense of fairness, the national labor policy, past practice at the plant and perhaps industrial practice generally. *Of these past practice is the most significant.*" Emphasis supplied.

The effect of what has been said is that Section 301 imposes on the court the duty to determine whether there has been a breach, and in cases of this kind the *Lincoln Mills* decision limits its inquiry to whether there has been a breach of an agreement to arbitrate; beyond that the court may not go. The rest is for the arbitrator—*if* there has been a breach of the agreement to arbitrate.

The writers have frankly acknowledged, they have nowhere disputed, that the district courts, contrary to the view of petitioner here, *must* have the authority to construe the contract and facts as to arbitrability. That authority, they agree, is "unassailable." Aaron, *Arbitration and the Law*, pp. 8-9; Cox, *Arbitration and the Law*, pp. 24, 55; Rosenfarb, New York University Sixth Annual Conference on Labor, p. 161 *et seq.*; Rose, New York University Eighth Annual Conference on Labor, p. 351 *et seq.*

II.

The District Court acted properly in refusing to order arbitration in this case.

(a) The procedural and substantive law governing the court in deciding whether a grievance is arbitrable is that of a court of law and equity giving due regard to all pertinent factors.

As noted, the legislative history of Section 301 shows its purpose to give a realistic remedy for breach of contract. *Lincoln Mills'* use of Section 301(a) to compel arbitration does not detract from the Congressional purpose of providing a forum in the federal district court for the decision as to whether the contract was breached. If the agreement that is alleged to have been breached is an alleged *agreement to arbitrate*, then under Section 301(a) the federal district court must construe *that*

agreement—as it would construe any other labor agreement tendered to it in a Section 301 suit.

It has been urged that to permit the court to decide arbitrability is to permit it to decide the merits, but even if that were so, and it is *not* so in this case, such a circumstance is not novel in our law. Cf. *Land v. Dollar*, 1947, 330 U.S. 731, 739: "We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." That would also be true where arbitration was confined to specified subjects, or where a court would reject a claim for lack of jurisdiction without reaching the merits.

It is hardly likely that in all cases involving orders compelling arbitration or adherence to arbitration awards the courts will be able to avoid doing what the District Court did here, i.e., look at *some* facts. Anyway, there is a difference between evidence of jurisdiction (or arbitrability) and evidence as to the merits. As set forth in *Engineers Assn. v. Sperry*, 251 F. 2d at p. 137, it does not detract from the function of the arbitrator for the court to require enough proof to establish the claim of arbitrability.

The great body of contract law, and that of equity—from both of which the arbitrators develop their principles—is and should be as accessible to judges as to arbitrators, for the judges came first.[28] And, for that matter, judges can and do borrow from reasoning of arbitrators, too. The courts today are well prepared to apply

[28] The error of underestimating the capacity of the federal judge to adapt his decisions to the particular causes at hand has led some thinkers astray. "There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements." Dissent, *Lewis v. Benedict Coal Corp.*, ... U.S. ....., 4 L. Ed. 2d 442, at p. 455 (1960).

labor contract and labor arbitration principles in their interpretation of labor agreements.

The substantive law, then, that the courts should apply in determining arbitrability is primarily *the law* which has always governed when equity has been involved—with weighty consideration of the policies here enumerated, e.g., encouragement of *voluntary* arbitration but also of *free* collective bargaining, i.e., judicial recognition of what the parties themselves have agreed upon. The arbitration process can hardly claim superiority in flexibility or earthy justice over a court of equity. If those who feel that arbitrators are more sensitive than judges to the needs of the parties affected by labor contract interpretation would, instead, present their arguments in forthright fashion to the courts, they might soon withdraw their objections.[27]

Restatement of the Law of Contracts, American Law Institute, Volume 1, Sections 246, 247, pages 345, 349, sets out that parties having contracted on the subject matter concerning which there were known usages or customs prevailing, incorporated such usages or customs by implication into their agreements, nothing having been

[27] See p. 24, Cox, *Arbitration and the Law*: "The ruling that the federal courts are to develop a substantive law of collective bargaining agreements also presents a challenge to labor specialists and the legal profession. The federal judges start with a clean slate. The Supreme Court has instructed them to fashion a law * * * from the express provisions, the penumbra and the policy of our national laws. Outside of the area controlled by statute there is no more important treasury of experience than the record of grievance arbitrations. We may have been bemused by the precepts that justice requires deciding each case upon its merits and that no two contracts are quite the same, but surely we have not labored at the administration of collective bargaining agreements for almost two decades without arriving at some generalizations upon which the unbiased can agree even though partisan interests preclude unanimity * * *. Counsel will face the further problem of translating the ways of the industrial world into legal doctrines comprehensible to judges who lack industrial experience. However, if the professional arbitrators and labor lawyers who work with them can surmount these obstacles, the industrial jurisprudence which they have been developing might give wisdom and vitality to conventional law."

said to the contrary.[28] Therefore, as a matter of law, evidence on these customs is and was admissible and is pertinent to a determination of what the parties meant, *U. S. v. Manufacturers Cas. Ins. Co.*, D.C., N.Y., 1957, 158 F. Supp. 319; and the court is obliged, in carrying out its duty of determining whether the matter is arbitrable, to look at that evidence, though "the true standard of interpretation must be objective." P. 50 of Cox, *Arbitration and the Law*. The court must "ascertain the intent of the parties since the scope of the arbitration agreement and the authority of the arbitrator stem from their agreement * * * .". Rose, "Arbitration and the Courts," New York University Eighth Annual Conference on Labor, Matthew Bender & Co., Inc., New York, 1955, p. 351 *et seq.*, at p. 357. An arbitrator would, if so empowered, certainly have the right to consider this evidence in determining whether the matter is arbitrable; if the arbitrator would be empowered to rule on the arbitrability of the issue, the court which is bound, as here, to determine arbitrability, may also look at the evidence to the extent necessary to discharge its duty.[29]

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[28] For Alabama cases on this point see *City of Birmingham v. I. E. Morris and Associates*, 1951, 256 Ala. 273, 54 So. 2d 555; *Ingalls Iron Works Co. v. Ingalls*, 1951, 256 Ala. 124, 53 So. 2d 847. In both cases the Alabama Supreme Court said that to properly interpret contracts, the aid of parol evidence may be obtained to ascertain (*City of Birmingham* case, 54 So. 2d, at p. 558) "what were the circumstances under which a contract was made, what was the relation of the parties, and what was within their mutual knowledge * * * ." This becomes critical with reference to the evidence that the Union in negotiating this and previous labor contracts with the Company in the case at bar, sought unsuccessfully to obtain a provision limiting the right to contract out work, and with reference to the evidence that in all the years of contractual relations between the parties, throughout which time the Company continuously contracted out repair work, the petitioner made no complaint of contract violation until August, 1958. R. 76, 73-75.

[29] Under Fed. Rules Civ. Procedure, Rule 43(e), 28 U.S.C., p. 271, where facts are challenged by motion to dismiss, the plaintiff is required to support them by competent proof. *Hollywood Associates v. Morris*, D.C., N.Y., 1952, 13 F.R.D. 141; *Bucholz v. Dutton*, D.C. Mont., 1957, 153 F. Supp. 62.

Respondent, after filing its motion to dismiss, offered to submit the facts *bearing on arbitrability* to the Court by affidavit, as permitted by Rule 43(e), but petitioner insisted on hearing witnesses, R. 32, who at once were put on for the purpose of exploring the *merits of the grievance* itself, R. 34 *et seq.*

The emphasis placed on expertise by the critics of judicial interpretation of labor contracts finds a parallel in the construction by reviewing courts of NLRB orders. Ultimately Congress demonstrated its wishes in the matter through the Taft-Hartley and Administrative Procedure Acts, and the courts have since had much to say about the evaluation of facts which formerly they had been forbidden to disturb. *Universal Camera v. NLRB*, 340 U.S. 474, 497 (1951); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1951). At the same time, in adopting the Taft-Hartley Act and providing for temporary injunctions in certain cases, Congress made certain that the courts should not be the mere automatic servant of the Labor Board (here likened to the arbitrator) which had to decide these cases on the merits, and stipulated for the use of their judgment as to what was "just and proper" and authorized their consideration of evidence. 29 U.S.C. Section 160(l). And the courts have not hesitated to reject the Board's judgment as to whether it had a case warranting a temporary injunction. *Madden v. Masters, Mates & Pilots*, D.C., N. Ill., 1958, 166 F. Supp. 862; *Alpert v. Steelworkers*, D.C., Mass., 1956, 141 F. Supp. 447.

(b) The District Court here did not abuse its authority or discretion in refusing to order arbitration.

It does not appear from petitioner's brief that it would necessarily contest the authority of the District Court to go into the facts, outside the contract, relating to arbitrability if the Court has authority to determine arbitrability; petitioner, rather, argues that (1) it is for the arbitrator to decide whether the issue is arbitrable, and (2) the Court decided this case on the merits not of arbitrability of the grievance but of the grievance

itself. But whatever else may be said with respect to the decisions appealed from, the District Court found, R. 105-106: (1) nothing in the contract limiting the Company's right to contract out work, Finding 9, and (2) nothing in the contract which it could construe to allow arbitration of a complaint against contracting out work, Finding 10, after finding that the Union had tried and failed to get a limitation thereon into the contract, Finding 8, and that the Company had engaged in this practice throughout its existence and its several labor contracts with the Union, Findings 5, 6, without objection by the Union, Findings 8, 9. Without more, the Court could have supported its conclusions, R. 107, Nos. 4, 5, that the contract did not limit contracting out work and did not allow arbitration of a grievance thereon. The Court found, further, R. 106, Finding 11, that, *in the light of the preceding findings*, the recognition by the parties in the express terms of the agreement of the reservation solely to management of unilateral action on "matters which are strictly a function of management" included the subject matter of the grievance. Thus, all the findings of fact necessary to the conclusion of law were based on *evidence as to arbitrability*, i.e., whether the contract required the Company to submit this grievance to arbitration—and if other findings and conclusions may be said to have related to the merits of the grievance itself, they were unnecessary, mere surplusage, and cannot affect the validity or soundness of the District Court's decision. The Circuit Court's opinion is based, R. 110-113, exclusively on those findings and conclusions of the District Court which deal entirely with interpretation of the contract language, and the conduct of the parties showing their intent with reference thereto.

Why did the contract not refer to this subject, one

commonly found in labor agreements?[30] Was the Court not entitled to ask, and be shown, why the contract was silent on this point? The explanation, freely admitted by the Union (R. 98-99), was that the parties had negotiated on this before this contract was executed, and before their earlier agreements were signed, and the Union had not succeeded in getting that limitation into the contract. R. 73, 75. The Court had a right to conclude that the Union was merely seeking to obtain by arbitration, there being no requirement therefor in the contract, that which it had not been able to obtain in collective bargaining—by a subversion of the arbitration process, as it were. Further illumination was shed on the bad faith

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[30] Significantly assigning this data to its section on "Management & Union Rights," the Bureau of National Affairs in its continuously current looseleaf service on *"Collective Bargaining—Negotiations and Contracts,"* p. 65:3, notes that "(r)estrictions on management prerogatives are imposed in 55 per cent of contracts * * * Limitations on the right of management to contract work, either within the plant or the outside, are treated in slightly over one-fifth of agreements * * * ." See, also, on detailed nature of labor contracts today—Updegraff and McCoy, *Arbitration of Labor Disputes*, Commerce Clearing House, Inc., Chicago, 1946, pp. 135-136. On the inclusion of clauses limiting subcontracting or contracting out of work—see Cox, *Arbitration and the Law*, p. 34; *Understanding Collective Bargaining*, 1958, Amer. Management Assn., Inc., New York, p. 51 ("The real trouble occurs only when management imposes further restrictions on itself by giving away essential management rights at a bargaining table. Typical union demands include * * * restriction of the right to sub-contract * * *. Demands of this type are clear invasions of the area of management prerogatives, yet management has been responding to pressure with increasing frequency * * * "; *Union Contract Clauses*, 1954, Commerce Clearing House, Inc., Chicago, p. 747; and literally hundreds of arbitration cases, including *Lone Star Steel Company and United Steelworkers of America, Local Union 4134* (1959), 32 LA 464; *Southern Bell Telephone & Telegraph Company and Communications Workers of America* (1959), 32 LA 351; *New York & Pennsylvania Company, Inc., and United Papermakers & Paperworkers, Local 701* (1959), 32 LA 131; *Kurth Malting Company and International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, Local No. 9* (1958), 31 LA 607; *National Lead Company and United Automobile, Aircraft & Agricultural Implement Workers of America* (1958), 30 LA 893; *Mack Manufacturing Corporation and United Automobile, Aircraft & Agricultural Implement Workers of America* (1958), 30 LA 1053; *Washington Gas Light Company and International Chemical Workers Union* (1957), 29 LA 824; *Joseph S. Finch & Company and International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America* (1957), 29 LA 609. See also *NLRB v. Local 294, Teamsters*, CA-2, 1960, 273 F. 2d 696, in which a union struck over the subcontracting of work.

of the Union in seeking arbitration here, and upon the meaning of the arbitration limitation, by these facts which the Court considered: (1) The Company had for many years done openly what it was doing now; the Union had not objected to the practice of contracting out. R. 105, Findings 5, 6, 8. (2) It was not until almost 2 years after the affected employees were laid off and the contract executed that the Union filed this grievance, the contracting out practice continuing all the time. R. 105, Findings 2, 8, 9.

In looking at the contract, the Court found express prohibition of arbitration on "matters which are strictly a function of management." R. 106, Finding 11. Management functions "vested exclusively in the Company," that is, outside the scope of arbitration, are set out in the contract to include "management of the Company" and "direction of the work-force, including the right to * * * relieve employees from duty because of lack of work, or for other legitimate reasons * * *." Section 11 (R. 17-18).

Although not necessary to sustain the decision below, there is respectable support for the argument that unions as well as management consider that "management rights" inherently include the right to contract out work, unless bargained away in the labor agreement. The view is widely held that a collective bargaining agreement represents concessions by management, and that it does not cover subjects not referred to therein. See fn. 30. *Collective Bargaining—Negotiations and Contracts*, BNA, Washington, D. C., p. 65:1. Management impliedly retains those prerogatives and functions which are not bargained away in the agreement itself. *1960 Guidebook to Labor Relations*, Commerce Clearing House, Inc., Chicago, p. 260. Even a vague management rights clause

suggests that the boundaries of arbitration may be narrower than under a contract without it.[31] And, as elsewhere noted herein, the national labor policy does not compel an employer *even to bargain* during the contract term on subjects on which management has refused to make concessions in negotiations. *Matter of Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), *enf'd NLRB v. Jacobs Mfg. Co.*, CA-2, 1952, 196 F. 2d 680.

> **If an employer may not be found to have violated the National Labor Relations Act for refusal to *negotiate*, it may be argued that the national policy—which also protects the right of refusal to make concessions, *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395—militates against strained interpretation of an agreement to compel *arbitration* if the effect could be to force (as in this case) the employer—not merely to *negotiate*—to make the very concession he had managed to save (at perhaps crippling expenses in other concessions or in a major strike) in the collective bargaining struggle.**

The Union referred below, as it does here, Br. p. 63, to the later language of Section 10 (R. 15-17) making arbitrable "differences * * * between the Company and the Union * * * as to the meaning and application * * * of this agreement" and "local trouble of any kind", and suggests that it is sufficiently broad to require arbitration of this grievance.[32] Professor Cox has answered this

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[31] Cox, *Arbitration and the Law*, p. 52.

[32] The words "local trouble" are loosely set in the second paragraph of Section 10. These words do not enlarge the scope of arbitration. Cf. *Epperson v. Stacey*, 1957, 266 Ala. 396, 96 So. 2d 750: "If there exists inconsistency between two clauses of a contract which cannot be reconciled, the inconsistency must be resolved in favor of the prior clauses, unless an intention to thereafter qualify is plainly expressed." The rule of the State of Alabama would thus seem to give precedence to the exclusion from arbitration of those subjects covered by the first paragraph of Section 10 and by Section 11. See, also, *G. F. A. Assn. v. W. F. Covington Planter Co.*, 1939, 239 Ala. 562, 192 So. 2d 502.

(Continued)

contention by pointing out the marked distinction between the so-called conventional and "wide-open" clauses. See fn. 37, *infra.*

Of course, to say that this grievance constitutes a difference between the parties as to the meaning of the contract is to ignore the limitation on arbitration therein and to assume that the contract covers the subject involved. The same argument could as logically be made if the contract expressly excluded from arbitration the subject matter here involved, yet the Union filed a grievance—there would there, too, be a "*claim*," pet. Br. 44, a difference of opinion, whether in good or bad faith, over the meaning of the contract. Construed, then, from the objectively-demonstrated intent of the parties, excluding outside contracting from arbitration, there was left nothing for the arbitrator to resolve, for there was no "difference" remaining between the parties as to the meaning of the agreement.

Before the Circuit Court of Appeals, for the first time, the Union in its brief urged, without argument, that the Company had an obligation implied from Sections 1 (Intent), R. 5, 2 (Recognition), R. 5-6, 5 (Wages), R. 8-10, and 9 (Seniority), R. 14-15, of the

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[32] (Continued)

The Union introduced no evidence as to the meaning of the term "local trouble," and there can be no more than speculation as to what those words here can mean.

Petitioner certainly does not contend that this provision covers everything that may arise between the parties that is not covered by the contract. This could allow the union through arbitration to take over the entire concern. The only reasonable way it may be interpreted is that it applies only to matters covered by the contract, but not covered specifically or in detail. Cf. Construction of another loose term, "Working conditions," in *In re Chicago, North Shore & Milwaukee Railroad Co.*, CA-7, 1945, 147 F. 2d 723, *cert. den.*, 325 U.S. 852; *N. J. Bell Tel. Co. v. Comm. Workers*, 1950, 5 N.J. 354, 75 Atl. 721; *The United Furniture Workers v. Little Rock Furniture Mfg. Co.*, E.D. Ark., 1957, 148 F. Supp. 129, 132.

contract not to contract out work. The dissenting opinion of the Circuit Court of Appeals, R. 114 and fn. 1, same page, R. 117, 118, similarly seeks to strain unrelated contract provisions to provide a basis for arbitration by pointing to the Lockout, Section 3, R. 6, and Discrimination, Section 2, R. 5, clauses. Each of these contract provisions covers a purpose entirely foreign to that involved in the right or practice of contracting out work. There is nothing inconsistent between the contracting out of work and any of these provisions. The *recognition* of the Union as the bargaining agent for the employees is exclusive; the *wages* provide the rules of compensation for those employees; the *seniority* language proteets against favoritism and discrimination among those employees; the *lockout* provision protects the employees against closing down the operation to bring economic pressure upon the Union or upon the employees in connection with a labor dispute. Discrimination refers to reprisal on account of union membership. These are provisions which have their geneses in other circumstances. For example, on "recognition," cf. *Local Div. 1509, Amalgamated Assn. of Street, Electric Railway and Motor Coach Employees v. Eastern Mass. Street Railway Company*, D.C., Mass., 1958, 162 F. Supp. 942, 944, and Commerce Clearing House *Union Contract Clauses* 59 *et seq.* (1954); on "lockout," cf. *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957); on "seniority," see Commerce Clearing House *Union Contract Clauses* 447 *et seq.*, "By establishing length of service as a yardstick, it seeks to eliminate favoritism and discrimination in employment." Protection against discrimination for union activity obviously has as its purpose the prevention of favoritism in some manner of non-members

over union members. The Company has 5 union contracts covering its employees, 3 of them with the petitioner. R. 61-62. The record does not show that it has *any* non-union employees.

The court below did not send this *claim* of petitioner to arbitration because it found that the parties had, by *objective* means, demonstrated their agreement not to make the subject of the grievance an arbitrable issue. In so deciding, it did not abuse its authority, it was its duty to fairly and fully construe what the parties had decided to arbitrate, and what not, in their agreement covering arbitration. It did what it had to do—it interpreted "to give the instrument the application which the author(s) would have provided." Cox, p. 52, fn. 66, *Arbitration and the Law.*

III.

The decision on review is supported by public policy considerations.

Although it has been noted that there are here not present the elements ordinarily found when the effectuation of public policy is involved, for we are not in this case primarily construing a statute but rather a private agreement, and that Section 301(a) may not be read with the *Lincoln Mills* decision to give arbitrators more authority than the parties to the contract intended,[33] it may nonetheless be urged that the interest of the public—

[33] Cf. the reasoning of the Court in *NLRB v. Ins. Agents Union*, ___ U.S. ___, 4 L. Ed. 2d 454 (1960), referring to Labor Board authority to require good faith bargaining but not to prescribe more than the statute allows, no matter how desirable the end it seeks. As the Court there said, these are matters for Congress. 4 L. Ed. 2d at p. 469. In the same case, the dissent, 4 L. Ed. 2d at p. 471, referring for comparison to the *Lincoln Mills* decision, notes that a particular statutory provision must be applied in the light of the entire statutory

(Continued)

as well as of employers, unions and employees—will best be served if the parties are put on notice that they must say, in these agreements, what they intend.

In *Lewis v. Benedict Coal Corp.*, Nos. 18 and 19, ... U.S. ....., 4 L. Ed. 2d 442, 450 (1960), the Court, referring to the *Lincoln Mills* decision, said that in the discharge of the function of fashioning a body of federal law for the enforcement of collective bargaining agreements, it was holding that in the circumstances of that case "the parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed * * * ", in the light of the national labor policy; it is urged that the national labor policy requires decision by the Court that *in these circumstances*, also, in the absence of unequivocal words in the contract the parties have not agreed to arbitrate the question of contracting out work.

The desirability of careful contract drafting has not escaped the petitioner here, for in its widely-disseminated (to members and prospective members) booklet, *This is Your Union, The United Steelworkers of America*, privately printed, 1959, p. 6, under the heading, "Nothing is Overlooked in USWA (United Steelworkers of America)

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[33] (Continued)
purpose, with due regard to all its interrelated provisions. The jurisprudence under this statute shows its purpose to be to encourage unions and employers to make their own agreements, and to allow them to go to the *federal district court* for redress in their breach. Read together, the Taft-Hartley and Norris-LaGuardia Acts would mean, translated into terms of this case, that (1) the parties will be encouraged to bargain in good faith, but their collective bargaining agreement will not be disturbed, and they won't be made to bargain again during the contract term on something they have discussed and agreed to discard; (2) they will be encouraged to arbitrate their differences arising in the course of the contract term, but their agreement to arbitrate, once made, will be limited to what they intended thereby. Petitioner would construe the two-part collective bargaining-arbitration scheme to add an element of compulsion to each which Congress has not provided for.

Contracts," it declares: "No detail is overlooked in drafting the protective language of the agreement"; and, under the heading, "It's All in the Agreement," p. 10, "You don't run on guesswork when you work under a USWA contract. What is agreed to in negotiations is put down on paper. The company knows what is expected of it, and the worker always knows what the score is. A good contract has to be understood and enforced."

No longer may it be said that unions are so weak as to need help, from government or arbitrators, or in the nature of liberal construction of statutes to advance their progress;[34] or that they can't afford legal talent, if needed, for sound contract draftsmanship;[35] or that they have not the power to force management to concede a specific contract provision limiting contracting out of work, if they consider that more important than other concessions. If anything, the national labor policy of recent years has reflected in all labor legislation a trend toward aid of management against abuse by organized labor of its power.

There is little doubt, then, from the recent enormous growth of the labor movement, and the development of its power, backed by the great strength of the national labor policy which ensures its greater prosperity, that unions will quickly obtain in precise contract language all that they bargain for and can get in the give and take of collective bargaining. The question is—have they not

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[34] Cf. *NLRB v. Ins. Agents Int. Union*, 4 L. Ed. 2d 454, dissenting opinion, at p. 474; Velie, *Labor U.S.A.*, Harper & Brothers, N.Y., 1959, Chapters 15, 17, 19; Sweeney, *The United Steelworkers of America, 1936-1959*, privately printed; *U.S. News & World Report* (98% of employees in steel industry belong to the United Steelworkers' Union), Aug. 10, 1959, p. 23 *et seq.*, and Dec. 16, 1955, p. 23 *et seq.*; *Wall Street Journal*, Jan. 14, 1960, p. 6, "The Monopoly Power of Unions."

[35] Hardly a union exists that does not have ready help from wealthy international affiliates; unions today make business contracts covering financial, realty and other transactions involving millions of dollars.

matured sufficiently to warrant their having the responsibility of drafting their labor agreements with care? Who is to be hurt if they are made to do this? On the other hand, if that is not done, how is the employer to protect himself against vicarious interpretation of his limited agreement to arbitrate, except by rejecting *in toto* the whole idea of arbitration.[36] The argument that arbitration is to be encouraged, it would appear, should not overlook the possibility that arbitration as an institution may become discredited in the process of overindulgence.

The public policy, then, can best be served at this point in the development of our national labor policy by a holding which recognizes, as Congress has done in the Labor-Management Reporting and Disclosure Act of 1959, that unions have grown up; that they should be made to be responsible in the careful drafting of their labor agreements, toward the end that more, rather than less, certainty be encouraged in the contractual relationship. This is not to say that if those agreements provide for arbitration there should be any lessening of arbitration or its exhuberant vitality as now or in the future practiced; it is here set forth, however, that those agreements should satisfy the *federal courts* that they *do* provide for arbitration of the issue presented, or there will be no order of arbitration under Section 301(a).

The writers suggest precisely what is urged here as the solutions: (1) Put the parties on notice that, *however vague may be the remainder of their contract*, their agreement to arbitrate must say what it means or it

[36] Unions will not be apt to favor management-sought provisions making court determination of arbitrability a condition of arbitration, and any serious attempt by employers to negate arbitration of specific matters will soon demonstrate its impracticability. The protection against vicarious arbitration, if any, must come then from interpretation of the agreement to arbitrate.

will not be construed as a promise of arbitration.[37] (2) Urge for the courts' consideration all of the philosophy, industrial and arbitration background and reasoning which appeals to those arbitrators who distrust judicial "meddling"; our federal court system has shown its capacity to learn from progressive thinkers on the bench and in the academic world.[38] (3) If either party

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[37] Rosenfarb, "The Courts and Arbitration," New York University Sixth Annual Conference on Labor, Matthew Bender & Co., Inc., New York, 1953, p. 161 *et seq.*, at p. 178: "A more reliable key to arbitrational autonomy lies in the hands of the parties themselves. If the parties are minded to keep arbitration out of the courts they should address themselves with greater care and skill to the problems of drafting the arbitration clause." Aaron, p. 9, *Arbitration and the Law*, states: "* * * I do not think we can contribute to the solution of the problem * * * simply by adopting the slogan, 'Arbitrability for the arbitrators; judges go home.' Rather, we should urge employers and unions to include * * * specific procedures for dealing with issues of arbitrability." To the same effect, see Rose, p. 361, N.Y.U. 8th Ann. Conference; and Kramer, "Arbitration Under the Taft-Hartley Act," New York University Eleventh Annual Conference on Labor, Matthew Bender & Co., Inc., New York, 1958, p. 255 *et seq.*, at p. 282, and suggesting at pp. 283-284 that the problem, if any, is a matter for Congress. "This is a matter which the parties should consider when the agreement is negotiated," and they may escape the "evil" of judicial construction by putting arbitrability exclusively in the hands of the arbitrator. Cox, *Cases on Labor Law*, Foundation Press, Brooklyn, 4th Ed., 1958, pp. 775-776. *Cf. Lewis v. Benedict Coal Corp.*, 4 L. Ed. 2d 442, 450 (1960). It is not unusual, either, to find arbitration agreements broad enough to cover subjects not specified in the other provisions of the contract. Compare *Tenney Engineering, Inc. v. U. E.*, 174 F. Supp. 878 (D.C., N.J., 1959), with *Employees Assn. v. Procter & Gamble*, 172 F. Supp. 210 (D.C., Kan., 1959). And see Cox, p. 57, *Arbitration and the Law:* "I am persuaded that the conventional arbitration clause is not an agreement to allow an arbitrator to interpret its meaning, *thereby determining his own jurisdiction. The contrast between the wide-open clause and the conventional phraseology is too plain to be put down to inadvertence.* Apparently the parties choose it because one party, usually the employer, distrusts arbitration at least to the point of insisting upon the inclusion of some safeguard against the arbitrator's imposing significant obligations not contemplated by the agreement and beyond its scope. This clause * * * tells what (the arbitrator) *cannot* do. The protection sought by the employer would be drastically reduced by a construction which gave the arbitrator unlimited jurisdiction and merely warned against its exercise, for as a practical matter he would then have the power to impose obligations outside the contract limited only by his understanding and conscience. We can give effect to the underlying purpose only by excepting the interpretation of the arbitration clause from the general power to interpret, thus giving the court the duty to determine whether the claim which one side wishes to arbitrate gives rise to a dispute concerning the interpretation and application of the collective bargaining agreement.

"This does not mean that the court must decide every question antecedent to a determination of the merits of a grievance which might be thought to involve the arbitrability." Emphasis added.

[38] See footnotes 25, 26, 27.

to a contract wishes to confine the courts' participation in the arbitration process to enforcement of awards, let him expressly provide in his agreement that arbitrability shall be determined by the arbitrator.[39]

The first and third of these solutions would restrict the use of the federal courts to enforcement of arbitration awards under a limitation of authority to disturb (finality of arbitrations) which is well recognized in law and reason; there can be no serious quarrel with the wisdom[40] of our national policy in fostering arbitration. But, as long as the authority stems from Section 301(a), there can be no reconciliation between judicial construction of a legal instrument to determine whether the parties thereto have contracted to arbitrate, and the arbitration of the merits of a grievance by arbitrators who find arbitrability from the same facts at the same time relied upon to resolve the grievance itself.

In some quarters it is contended that the arbitration process will be hamstrung, and the federal courts cluttered, by suits to compel or avoid or enforce arbitration and arbitration awards, if the courts are permitted to determine arbitrability. This is not only wholly speculative; it is unrealistic and is not borne out by experience under the older Railway Labor Act or by the litigation since Section 301(a) of the Taft-Hartley Act was adopted *or* since the *Lincoln Mills* decision.[41]

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[39] See fn. 37.

[40] Arbitration is faster, less formal and legalistic, etc., than the legal system of the courts. Updegraff and McCoy, *Arbitration of Labor Disputes*, Commerce Clearing House, Chicago, 1946, p. 17.

[41] The number of applications of this kind made to the federal district courts is seen from examination of the reports in the labor law services to be inconsequential when compared to the hundreds of thousands of labor agreements in force and the thousands of arbitrators' decisions; moreover, comparatively few—of the few that reach the courts—present any problem beyond ordering a recalcitrant party to do what the agreement specifically requires. Analysis of the de-

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It has also been argued that less confusion would result, while fully protecting the rights of the parties, by letting arbitrators decide arbitrability in close cases, and then permitting review in the courts. This procedure not only would be contrary to a long established principle of our legal system, which is to take up first things first, but would not save time or confusion if there could be review of the arbitrators' rulings on arbitrability prior to the merits, would waste time and expense if there were reversal after the decision on the merits, and would complicate the issue of arbitrability if the arbitrator deferred ruling thereon until after hearing the merits. The decisions of the arbitrators may combine the issue of arbitrability with the merits of the grievance, making indistinguishable the legal and factual bases of the award. Cf. Justin, "*Arbitrability and the Arbitrator's Jurisdiction*," p. 1, at p. 16 ("tenuous line"), Proceedings of Ninth Annual Meeting of National Academy of Arbitrators, BNA, 1956. Unless the threshold judicial decision of arbitrability is available in the relatively few cases where it will be necessary, the arbitration process and its integrity in the enforcement of awards will be injured rather than benefitted.

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[41] (Continued)
cisions in the latest complete volume of Labor Arbitration Reports, No. 32 (Bureau of National Affairs, Inc., Washington, D.C., 1960) shows: Of the total of 356 decisions reported, 290 were by arbitrators, 30 were by New York courts under that state's labor arbitration statute, 12 were by all state courts in all other states combined, and 24 were by federal district and appellate courts combined. In these 24 cases decided by federal courts, only 18 involved the question of arbitrability; and in 12 of those 18 cases the federal courts issued orders compelling arbitration while in only 6 (including the instant *Warrior & Gulf* case) was the claim of arbitrability rejected.

See also, Smith & Merrifield, pp. 871, 882, *Labor Relations Law*, "only a very small percentage" of disputes under contracts go to arbitration, and "only a minute fraction * * * get to the courts." Moreover, a refusal to arbitrate risks damages at law for contract breach. Finally, the deterrent of a possible strike, then or at expiration of the agreement, poses a powerful reason against insisting upon a court ruling as to arbitrability. In the cases of this kind arising since *Lincoln Mills*, only a handful have resulted in refusal to order arbitration.

However desirable it might be, there can be no reliance on the alternative of judicial enforcement or review of an arbitrator's decision to protect the parties in a situation of the kind presented here, and a complex problem would only be made more complex by opening the way for a variety of exceptions to the established policy of disturbing arbitration awards only where fraud, bias and the like are present.[42] And where would the advantage be if the courts were to have to handle (in this situation, the cases would be infinitely more numerous) petitions for enforcement or review in the manner of NLRB orders?[43]

The judgment below is supported by public policy considerations, it is emphasized, because the national labor policy advances the cause of labor arbitration as a means of promoting industrial peace when it embraces the theory of responsible contract draftsmanship.

IV.

Petitioner's Contentions.

Petitioner over-simplifies and over-generalizes the problem here by seeking to treat it as one with cases of quite different character.

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[42] Errors of law or of fact will not, as a rule, permit setting aside an arbitration award. Smith & Merrifield, p. 882, *Labor Relations Law*. The arbitrator's award will not be disturbed, it is final on the law and facts, "unless perverse misconstruction or positive misconduct" or fraud or corruption by the arbitrator is found. *Matter of Wilkins*, 169 N.Y. 494, 496, 62 N.E. 575 (1902). *U. S. v. Wunderlich*, 342 U.S. 98, 100 (1951). Petitioner argues to same effect, Br. pp. 27, 44, when confronted with the problems of *United Steelworkers v. Enterprise Wheel and Car Corp.*, No. 538. The difficulty is increased by the provision almost invariably found in the agreement to arbitrate, in order to insure the advantages of the process, that the decision of the arbitrator shall be final, i.e., the parties forfeit their right of court review. R. 17; *Union Contract Clauses*, CCH, p. 614, ¶ 51,557.20; petitioner's Br. herein, p. 48, last paragraph.

[43] These have greatly occupied the Circuit Courts of Appeal, yet only pass from *one* tribunal, the Labor Board; review of arbitration decisions from all over the country would invite chaos. Arbitrability, without the confusion of a complex ruling first by the arbitrator, involves a narrow issue.

There are sharp distinctions between the case at bar and each of the other cases set with it for argument on the same day. *United Steelworkers of America v. American Manufacturing Company*, CA-6, 1959, 264 F. 2d 624, No. 360, does not at all involve arbitrability, that is, interpretation of the agreement to arbitrate, but, rather, whether the Court should order arbitration on a patently frivolous grievance; *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, CA-4, 1959, 269 F. 2d 327, No. 538, likewise does not involve arbitrability, but, rather, the power of the Court to modify an arbitration award. Nor are the facts the same here as in *Lodge 1912, International Association of Machinists v. United States Potash Company*, CA-10, 1959, 270 F. 2d 496, pet. for cert. filed, No. 554, U.S., Nov. 30, 1959, where, among other things, the parties had not negotiated on the subject matter of the grievance, and where the work contracted out was performed in the plant of and with facilities of the employer for whom the work was done, rather than, as here, on floating equipment of the employer (respondent) at shipyards with specialized facilities. Pet. brief in No. 554, *U. S. Potash Co. v. Lodge 1912, I.A.M.*, now pending in this Court on petition for certiorari, pp. 4, 5. There, moreover, is room for difference in the interpretation of commitments to arbitrate in different cases. The petitioner may not, either, derive comfort from the *Cameron Iron Works* case, CA-5, 1958, 257 F. 2d at p. 471, containing dicta to the effect that where broad arbitration language is present in an agreement the court ought not to look beyond it in deciding whether to compel arbitration, for that rule begs the question since the effect of it is merely to say that where the contract provides for arbitration, then arbitration shall be ordered.

As this Court has noted in stemming the flood of

Labor Board fact-review cases, *Universal Camera, supra*, 340 U.S., at p. 490-1, and in *NLRB v. Pittsburgh S.S. Co.*, 340 U.S., at p. 502, there may be a difference of views between courts even on the same facts, but that does not justify the conclusion that one *has* interpreted "only to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract," *Lodge 1912, Int. Assn. of Machinists v. U. S. Potash Co.*, 270 F. 2d, at p. 498, while the other *has not;* especially where there is such potent support for the judgment of the District Court here.

Warrior & Gulf is indeed different from *Enterprise Wheel and Car Corp.* and *American Manufacturing.* These three cases cannot be decided alike on the premise that they all involve interpretation of the same statutory provision, any more than the scores of other cases under the National Labor Relations Act or Taft-Hartley Act can be decided alike in situations differing as to facts and issues. Petitioner would have it understood that all arbitration provisions are basically the same, equally broad, and provide, with the substantive clauses of the contract, a code. The argument runs as if the code were like pre-emption, *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 481 (1955), a field which cannot be invaded by the courts but is pre-empted for arbitration. The fallacy in the argument is that as federal jurisdiction is a prerequisite to federal pre-emption, the jurisdiction of the arbitrator—or arbitrability—must be demonstrated to the court before he may act. There can be no other reading of Section 301(a), for, as all the courts and writers have noted, we have here a private, consensual agreement and the arbitrator is limited to that authority which the parties have conferred on him. He cannot determine his own *authority* from an interpretation of the recognition, seniority, discrimination, or other pro-

visions of the contract—and the language speaking to his authority must be interpreted as *contracts* are interpreted.

In pitching its case on the bald assertion, Br., p. 50, that any *claim* that a contract is violated makes that *claim* arbitrable, petitioner heavily relies on the theory that grievance arbitration is the *quid pro quo* for an absolute agreement not to strike, inferring that it has given up its right to strike, so it should be allowed to air its claim before an arbitrator. Would the same argument be made if it agreed not to strike and still had *no* agreement to arbitrate? Or, if the agreement to arbitrate expressly excluded therefrom the subject of contracting out work? Certainly it cannot be said that whenever a no-strike clause and an arbitration clause appear in the same contract, every conceivable dispute between the parties must be sent to arbitration if demanded by either. See, for example, *Employees Assn. v. Procter & Gamble*, 172 F. Supp. 210 (D.C., Kan., 1959), where arbitration was qualified. Justin, at p. 26 *op. cit.* p. 34, *supra*, states: " • • • when the clause limits arbitration to • • • 'the interpretation, application, or claimed violation • • • of this Agreement,' is it not equally reasonable to assume that the parties did *not* intend their private arbitration system to be equivalent in scope with the 'no-strike—no lockout' clause?"

Petitioner's quest has been exhaustive for a way around the *Lincoln Mills* direction requiring the district courts to pursue "federal law which the courts must fashion from the policy of our national laws." 353 U.S., at p. 457. The quest, it is emphasized, is for "a way around." Petitioner declares that the arbitrators' disappointment with the *Lincoln Mills* holding is "misdirected," Br., p. 51, and seeks to have the decision

interpreted to narrow the scope of the district court's authority to the mere ministerial function of lending its equity power to the arbitrator without any exercise of judgment or discretion or any contract interpretation, however slight.

It would appear that petitioner deems it helpful to have federal court support, it indeed embraces the use of the federal injunction to compel and enforce arbitration awards, but at the same time it eschews federal judicial thinking.

Petitioner argues, Br. pp. 44, 50, for an abstract principle of blind acceptance of the absolute autonomy of arbitration. It wants recognition of grievance arbitration as part of the continuing process of collective bargaining, Br. p. 39, and states, Br. p. 35, that because it is impossible to anticipate and provide for every problem that may arise in the course of a collective bargaining agreement, the contract is just a negotiated standard "with all the necessities for compromise and even deliberate ambiguity which such negotiations often require * * * ." But, even if so, can this be an excuse for imposing negotiation or compromise or allowing arbitration of a *claim* of contract breach based on provisions like lockout, discrimination, seniority and recognition when the parties have already bargained over the claim and, by calling off the fight, thereby agreed not to make any restriction on management's continued freedom to contract out repair work? As said in *U. S. Steel Corp. v. Nichols*, CA-6, 1956, 229 F. 2d 396, at p. 401, cert. den., 351 U.S. 950:

> "Against such a background of custom, protests and negotiations it can not be said that the issue * * * was inadvertently overlooked in executing the * * * contract * * * ."

The theories expounded by petitioner ignore these fundamentals:

(1) There is a point at which the obligation to bargain ceases. For example, what would there be to discuss, bargain, or arbitrate on a *claim* for $3 an hour if the contract provided that all employees were to be paid $2 per hour for all work done? Would it make any difference if the contract made no reference whatever as to rate of pay after the union had vigorously sought, and failed, in the negotiation of the contract, to set a fixed hourly rate of pay? *Matter of Jacobs Mfg. Co.*, 94 NLRB 1214, in effect holds, with obvious force, that it would destroy the stabilization purpose of labor contracts to allow unions to upset a bargain which as much includes that which the parties *affirmatively failed to agree on* as what they *affirmatively did agree on.* If, as petitioner contends, Br. p. 30, the Court must construe Section 301(a) as part of the scheme of bargaining in a *labor relations* statute, as distinguished from an *arbitration* statute, then in *Warrior & Gulf* it must be recognized that as a matter of law, *Jacobs Mfg. Co.*, outside contracting has been excluded from the continuing, pet. Br. p. 39, bargaining obligation which terminates, pet. Br. p. 40, in arbitration.

(2) Section 301(a), insofar as it applies to enforcing agreements to arbitrate, requires *court* construction of such agreements. If Section 301(a) were not necessary to the enforcement of these agreements, petitioner's thesis might, under our national policy, be valid. But it cannot, in view of the plain language of the statute, call upon the court to act with eyes closed.

That there may be abuses of court judgment, authority or discretion in cases of this kind may not be

disputed, for no one is perfect, but such abuses can be corrected by progressive litigation. The Court has admonished that the substantive law under Section 301(a) must be "fashioned," it cannot be settled *in toto* in this one case or in the three cases set consecutively for argument. For the *Warrior & Gulf* case it should suffice to hold that where it is undisputed, as here, that the parties negotiated on a restriction which did not get into the contract, and for years accepted the interpretation that the restriction was not arbitrable, the District Court did not abuse its authority under Section 301(a) to decree that the arbitrator had no jurisdiction over it, since its exercise was consistent with the federal labor policy under the National Labor Relations Act as interpreted by the Labor Board in the *Jacobs Manufacturing* case. To what extent the court may go in exercising its authority to determine arbitrability, this case will be but one criterion in the development of the federal law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

NATIONAL LABOR RELATIONS ACT

29 U.S.C. Section 151. The denial by *some* employers of the right of employees to organize and the refusal by *some* employers to accept the procedure of collective bargaining lead to strikes * * *.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

29 U.S.C. Section 160(l). Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), * * * the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the

filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. * * * Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony * * *.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

29 U.S.C. Section 158(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (d) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any

other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

THE RAILWAY LABOR ACT

45 U.S.C. Section 153. NATIONAL RAILROAD ADJUSTMENT BOARD - GRIEVANCES - INTERPRETATION OF AGREEMENTS.

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided —

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose

benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

45 U.S.C. Section 157. First. whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

* * * * *

45 U.S.C. Section 159. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulation of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however*, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further*, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

UNITED STATES ARBITRATION ACT

9 U.S.C. Section 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. Section 4. FAILURE TO ARBITRATE UNDER AGREEMENT: PETITION TO UNITED STATES COURT HAVING JURISDICTION FOR ORDER TO COMPEL ARBITRATION: NOTICE AND SERVICE THEREOF: HEARING AND DETERMINATION.

* * * * *

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, de-

mand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

SUPREME COURT OF THE UNITED STATES

No. 443.—October Term, 1959.

United Steelworkers of America, Petitioner, v. Warrior and Gulf Navigation Company.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 20, 1960.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent transports steel and steel products by barge and maintains a terminal at Chicasaw, Alabama, where it performs maintenance and repair work on its barges. The employees at that terminal constitute a bargaining unit covered by a collective bargaining agreement negotiated by petitioner union. Respondent between 1956 and 1958 laid off some employees, reducing the bargaining unit from 42 to 23 men. This reduction was due in part to respondent contracting maintenance work, previously done by its employees, to other companies. The latter used respondent's supervisors to lay out the work and hired some of the laid-off employees of respondent (at reduced wages). Some were in fact assigned to work on respondent's barges. A number of employees signed a grievance which petitioner presented to respondent, the grievance reading:

> "We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.
>
> "This practice becomes unreasonable, unjust and discriminatory in view of the fact that at present

there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work.

"Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lockout, of a number of the employees who would otherwise be working were it not for this unfair practice."

The collective agreement had both a "no strike" and a "no lockout" provision. It also had a grievance procedure which provided in relevant part as follows:

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

"A. For Maintenance Employees:

"First, between the aggrieved employees, and the Foreman involved; Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic."

. . . . . .

"Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly peti-

tion the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final."

Settlement of this grievance was not had and respondent refused arbitration. This suit was then commenced by the union to compel it.[1]

The District Court granted respondent's motion to dismiss the complaint. 168 F. Supp. 702. It held after hearing evidence, much of which went to the merits of the grievance, that the agreement did not "confide in an arbitrator the right to review the defendant's business judgment in contracting out work." *Id.*, at 705. It further held that "the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here." *Ibid.* The Court of Appeals affirmed by a divided vote, 269 F. 2d 633, the majority holding that the collective agreement had withdrawn from the grievance procedure "matters which are strictly a function of management" and that contracting-out fell in that exception. The case is here on a writ of certiorari. 361 U. S. 912.

We held in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, that a grievance arbitration provision in a collective agreement could be enforced by reason of § 301 (a) of

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[1] Section 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (a), provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." See *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448.

the Labor Management Relations Act[2] and that the policy to be applied in enforcing this type of arbitration was that reflected in our national labor laws. *Id.*, at 456–457. The present federal policy is to promote industrial stabilization through the collective bargaining agreement.[3] *Id.*, at 453–454. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[4]

Thus the run of arbitration cases, illustrated by *Wilko* v. *Swan*, 346 U. S. 427, become irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the

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[2] Note 1, *supra*.

[3] In § 8 (d) of the 1947 Act, 29 U. S. C. § 158 (d), Congress indeed provided that where there was a collective agreement for a fixed term the duty to bargain did not require either party "to discuss or agree to any modification of the terms and conditions contained in" the contract. And see *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332.

[4] Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the "*quid pro quo*" for the agreement not to strike. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 455.

draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004–1005. The collective agreement covers the whole employment relationship.[5] It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it: [6]

> ". . . [I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules –

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[5] "Contracts which ban strikes often provide for lifting the ban under certain conditions. Unconditional pledges against strikes are, however, somewhat more frequent than conditional ones. Where conditions are attached to no-strike pledges, one or both of two approaches may be used: certain *subjects* may be exempted from the scope of the pledge, or the pledge may be lifted after certain *procedures* are followed by the union. (Similar qualifications may be made in pledges against lockouts.)

"Most frequent conditions for lifting no-strike pledges are: (1) The occurrence of a deadlock in wage reopening negotiations; and (2) violation of the contract, especially non-compliance with the grievance procedure and failure to abide by an arbitration award.

"No-strike pledges may also be lifted after compliance with specified procedures. Some contracts permit the union to strike after the grievance procedure has been exhausted without a settlement, and where arbitration is not prescribed as the final recourse. Other contracts permit a strike if mediation efforts fail, or after a specified cooling-off period." Collective Bargaining Negotiations and Contracts, Bureau of National Affairs, Inc., 77:101.

[6] Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498–1499 (1959).

governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather it is between having that relationship governed by an agreed upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over and extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and

good faith." Shulman, *supra*, at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement.

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . ." Shulman, *supra*, at 1016.

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant

party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[7]

We do not agree with the lower courts that contracting-out grievances were necessarily excepted from the grievance procedure of this agreement. To be sure the agreement provides that "matters which are strictly a function of management shall not be subject to arbitration." But it goes on to say that if "differences" arise or if "any local trouble of any kind" arises, the grievance procedure shall be applicable.

Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditons. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute

[7] It is clear that under both the agreement in this case and that involved in *American Manufacturing Co., ante*, p. —, the question of arbitrability is for the courts to decide. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508–1509. Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.

no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes. This comprehensive reach of the collective bargaining agreement does not mean, however, that the language, "strictly a function of management" has no meaning.

"Strictly a function of management" might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge. But if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the exception. Every grievance in a sense involves a claim that management has violated some provision of the agreement.

Accordingly, "strictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion. Respondent claims that the contracting-out of work falls within this category. Contracting-out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.[8] A specific collective bargaining agreement may exclude contracting-out from the grievance procedure. Or a written collateral agreement may make clear that contracting-out

[8] See *Celanese Corp. of America*, 33 Lab. Arb. 925, 941 (1959), where the arbiter in a grievance growing out of contracting-out work said:

"In my research I have located 64 published decisions which have been concerned with this issue covering a wide range of factual situations but all of them with the common characteristic—i. e., the contracting-out of work involved occurred under an Agreement that contained no provision that specifically mentioned contracting-out of work."

was not a matter for arbitration. In such a case a grievance based solely on contracting-out would not be arbitrable. Here, however, there is no such provision. Nor is there any showing that the parties designed the phrase "strictly a function of management" to encompass any and all forms of contracting-out. In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.

The grievance alleged that the contracting-out was a violation of the collective bargaining agreement. There was, therefore, a dispute "as to the meaning and application of the provisions of this Agreement" which the parties had agreed would be determined by arbitration.

The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting-out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 443.—October Term, 1959.

United Steelworkers of America, Petitioner, *v.* Warrior and Gulf Navigation Company.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 20, 1960.]

Mr. Justice Whittaker, dissenting.

Until today, I have understood it to be the unquestioned law, as this Court has consistently held, that arbitrators are private judges chosen by the parties to decide particular matters specifically submitted; [1] that the contract under which matters are submitted to arbitrators is at once the source and limit of their authority and power; [2] and that their power to decide issues with finality, thus ousting the normal functions of the courts, must rest upon a clear, definitive agreement of the parties, as such powers can never be implied. *United States* v. *Moorman*, 338 U. S. 457, 462; [3] *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298, 309. [4] See also *Fernandez & Hnos*

[1] "Arbitrators are judges chosen by the parties to decide the matter submitted to them." *Burchell* v. *Marsh*, 17 How. 334, 349.

[2] "The agreement under which [the arbitrators] were selected *was at once the source and limit of their authority*, and the award, to be binding, must, in substance and form, conform to the submission." *Continental Ins. Co.* v. *Garrett*, 125 F. 589, 590 (C. A. 6th Cir.)—Opinion by Judge, later Mr. Justice, Lurton. (Emphasis added.)

[3] "It is true that *the intention of the parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language.*" *United States* v. *Moorman*, 338 U. S. 457, 462. (Emphasis added.)

[4] "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298, 309. (Emphasis added.)

v. *Rickert Mills*, 119 F. 2d 809, 815 (C. A. 1st Cir.); *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299, 169 N. E. 386, 391;[6] *Continental Milling & Feed Co.* v. *Doughnut Corp.*, 186 Md. 669, 48 A. 2d 447, 450; *Jacob* v. *Weisser*, 207 Pa. 484, 56 A. 1065, 1067.[7] I believe that the Court today departs the established principles announced in these decisions.

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[5] "A party is never required to submit to arbitration any question which he has not agreed so to submit, and contracts providing for arbitration *will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" *Fernandez & Hnos* v. *Rickert Rice Mills*, 119 F. 2d 809, 815 (C. A. 1st Cir.). (Emphasis added.)

[6] In this leading case, Judge, later Mr. Justice, Cardozo said:

"The question is one of intention, to be ascertained by the same tests that are applied to contracts generally . . . . No one is under a duty to resort to these conventional tribunals, however helpful their processes, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others." *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299, 169 N. E. 386, 391. (Emphasis added.)

[7] In this case, the Court, after quoting Judge Cardozo's language in *Marchant*, *supra*, saying that "the question is one of intention," said:

"Sound policy demands that the terms of an arbitration *must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the Court, for trial by jury cannot be taken away in any case merely by implication.*" *Continental Milling & Feed Co.* v. *Doughnut Corp.*, 186 Md. 669, 676, 48 A. 2d 447, 450. (Emphasis added.)

[8] "But, under any circumstances, before the decision of an arbitrator can be held final and conclusive, it must appear, as was said in *Chandley Bros.* v. *Cambridge Springs*, 200 Pa. 230, 49 Atl. 772, *that power to pass upon the subject-matter, is clearly given to him. 'The terms of the agreement are not to be strained to discover it. They must be clear and unmistakable to oust the jurisdiction of the courts; for trial by jury cannot be taken away by implication merely in any case.'*" *Jacob* v. *Weisser*, 207 Pa. 484, 489, 56 A. 1065, 1067. (Emphasis added.)

Here, the employer operates a shop for the normal maintenance of its barges, but it is not equipped to make major repairs, and accordingly the employer has, from the beginning of its operations more than 19 years ago, contracted out its major work. During most, if not all, of this time the union has represented the employees in that unit. The District Court found that "[t]hroughout the successive labor agreements between these parties, including the present one, . . . [the union] has unsuccessfully sought to negotiate changes in the labor contract, and particularly during the negotiation of the present labor agreement, . . . which would have limited the right of the [employer] to continue the practice of contracting out such work." 168 F. Supp. 702, 704–705.

The labor agreement involved here provides for arbitration of disputes respecting the interpretation and application of the agreement and, arguably, also some other things. But the first paragraph of the arbitration section says: "[M]atters which are strictly a function of management shall not be subject to arbitration under this section." Although acquiescing for 19 years in the employer's interpretation that contracting out work was "strictly a function of management," and having repeatedly tried—particularly in the negotiation of the agreement involved here—but unsuccessfully, to induce the employer to agree to a covenant that would prohibit it from contracting out work, the union, after having agreed to and signed the contract involved, presented a "grievance" on the ground that the employer's contracting out work, at a time when some employees in the unit were laid off for lack of work, constituted a partial "lockout" of employees in violation of the antilockout provision of the agreement.

Being unable to persuade the employer to agree to cease contracting out work or to agree to arbitrate the "grievance," the union brought this action in the District Court,

under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, for a decree compelling the employer to submit the "grievance" to arbitration. The District Court, holding that the contracting out of work was, and over a long course of dealings had been interpreted and understood by the parties to be, "strictly a function of management," and was therefore specifically excluded from arbitration by the terms of the contract, denied the relief prayed, 168 F. Supp. 702. The Court of Appeals affirmed, 269 F. 2d 633, and we granted certiorari. 361 U. S. 912.

The Court now reverses the judgment of the Court of Appeals. It holds that the arbitrator's source of law is "not confined to the express provisions of the contract," that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute," that "[d]oubts [of arbitrability] should be resolved in favor of coverage," and that when, as here, "a no-strike clause is included in the agreement, then . . . everything that management does is subject to [arbitration]." I understand the Court thus to hold that the arbitrators are not confined to the express provisions of the contract, that arbitration is to be ordered unless it may be said with positive assurance that arbitration of a particular dispute is excluded by the contract, that doubts of arbitrability are to be resolved in favor of arbitration, and that when, as here, the contract contains a no-strike clause, everything that management does is subject to arbitration.

This is an entirely new and strange doctrine to me. I suggest, with deference, that it departs both the contract of the parties and the controlling decisions of this Court. I find nothing in the contract that purports to confer upon arbitrators any such general breadth of private judicial power. The Court cites no legislative or judicial authority

that creates for or gives to arbitrators such broad general powers. And I respectfully submit that today's decision cannot be squared with the statement of Judge, later Mr. Justice, Cardozo in *Marchant* that "no one is under a duty to resort to these conventional tribunals, however helpful their process, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thoughts of others," 252 N. Y., at 299, 169 N. E., at 391 (emphasis added); nor with his statement in that case that "[t]he question is one of intention, to be ascertained by the same tests that are applied to contacts generally," *id.*, nor with this Court's statement in *Moorman*, "that the intention of the parties to submit their contractual disputes to final determination outside the courts *should be made manifest by plain language*," 338 U. S., at 462 (emphasis added); nor with this Court's statement in *Hensey* that: "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." 205 U. S., at 309. (Emphasis added.) "A party is never required to submit to arbitration any question which he has not agreed so to submit, and *contracts providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" *Fernandez & Hnos* v. *Rickert Rice Mills*, *supra*, 119 F. 2d, at 815 (C. A. 1st Cir.). (Emphasis added.)

With respect, I submit that there is nothing in the contract here to indicate that the employer "signified [its] willingness" (*Marchant*, *supra*, at 391) to submit to arbitrators whether it must cease contracting out work. Certainly no such intention is "made manifest by plain language" (*Moorman*, *supra*, at 462), as the law "requires," because such consent "is not to be implied." *Hensey*, *supra*, at 309.) To the contrary, the parties by their con-

duct over many years interpreted the contracting out of major repair work to be "strictly a function of management," and if, as the concurring opinion suggests, the words of the contract can "be understood only by reference to the background which gave rise to their inclusion," then the interpretation given by the parties over 19 years to the phrase "matters which are strictly a function of management" should logically have some significance here. By their contract, the parties agreed that "matters which are strictly a function of management shall not be subject to arbitration." The union over the course of many years repeatedly tried to induce the employer to agree to a covenant prohibiting the contracting out of work, but was never successful. The union again made such an effort in negotiating the very contract involved here, and, failing of success, signed the contract, knowing, of course, that it did not contain any such covenant, but that, to the contrary, it contained, just as had the former contracts, a covenant that "matters which are strictly a function of management shall not be subject to arbitration." Does not this show that, instead of signifying a willingness to submit to arbitration the matter of whether the employer might continue to contract out work, the parties fairly agreed to exclude at least that matter from arbitration? Surely it cannot be said that the parties agreed to such a submission by any "plain language." *Moorman*, *supra*, at 462, and *Hensey*, *supra*, at 309. Does not then the Court's opinion compel the employer "to submit to arbitration [a] question which [it] has not agreed so to submit"? (*Fernandez & Hnos*, *supra*, at 815.)

Surely the question whether a particular subject, or class of subjects are or are not made arbitrable by a contract is a judicial question, and if, as the concurring opinion suggests, "the Court may conclude that [the contract] commits to arbitration any [subject or class of subjects]."

it may likewise conclude that the contract does not commit such subject or class of subjects to arbitration, and "[w]ith that finding the Court will have exhausted its function" no more nor less by denying arbitration than by ordering it. Here the District Court found, and the Court of Appeals approved its finding, that by the terms of the contract, as interpreted by the parties over 19 years, the contracting out of work was "strictly a function of management" and "not subject to arbitration." That finding, I think, should be accepted here. Acceptance of it requires affirmance of the judgment.

I agree with the Court that courts have no proper concern with the "merits" of claims which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators. But the question is one of jurisdiction. Neither may entrench upon the jurisdiction of the other. The test is: Did the parties in their contract "manifest by plain language" (*Moorman*, *supra*, at 462) their willingness to submit the issue in controversy to arbitrators? If they did, then the arbitrators have exclusive jurisdiction of it, and the courts, absent fraud or the like, must respect that exclusive jurisdiction and cannot interfere. But if they did not, then the courts must exercise their jurisdiction, when properly invoked, to protect the citizen against the attempted use by arbitrators of pretended powers actually never conferred. That question always is, and from its very nature must be, a judicial one. Such was the question presented to the District Court and the Court of Appeals here. They found the jurisdictional facts, properly applied the settled law to those facts, and correctly decided the case. I would therefore affirm the judgment.